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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

KEITH ROBINSON AND J. STUART FERGUSON,

Petitioners,

v.

JAMES BRUNING,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

DON D. JACOBSON*
LOHF, SHAIMAN & ROSS, P.C.
Attorneys for Petitioners
950 South Cherry Street #900
Denver, Colorado 80222
(303) 753-9000

March, 1992.

*Counsel of Record.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did police officers violate a rape suspect's clearly established rights under the Fourth and Fourteenth Amendments, when the officers omitted information which might affect the credibility of the rape victim's identification of the suspect from applications for an order for nontestimonial identification and a warrant for arrest?

2. When police officers assert their qualified immunity in defending a civil action brought by a rape suspect under 42 U.S.C. § 1983, are the officers required to bear the burden of trial on the merits in order to have their claim of qualified immunity determined?

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No. _____

In The

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KEITH ROBINSON AND J. STUART FERGUSON,

Petitioners,

v.

JAMES BRUNING,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Keith Robinson and J. Stuart Ferguson petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 949 F.2d 352. The order of the district court (App., *infra*, 19a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1991. The petition for rehearing was denied December 13, 1991. (App., *infra*, 36a-37a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND FEDERAL STATUTORY PROVISIONS AND STATE PROCEDURAL RULE INVOLVED

The Fourth Amendment provides, in pertinent part, as follows:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons or things to be seized.

The Fourteenth Amendment provides, in pertinent part, as follows:

> Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rule 41.1 of the Colorado Rules of Criminal Procedure provides, in pertinent part, as follows:

> (a) A non-testimonial identification order . . . may be issued by any judge of the Supreme, District, Superior, County Court or Court of Appeals.
>
> * * *
>
> (c) An order shall issue only on an affidavit or affidavits sworn to or affirmed before the judge and establishing the following grounds for the order:
>
> > (1) That there is probable cause to believe that an offense has been committed;
> >
> > (2) That there are reasonable grounds not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and
> >
> > (3) That the results of specific non-testimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.

STATEMENT OF THE CASE

Petitioners Keith Robinson and J. Stuart Ferguson, officers of the Gunnison, Colorado, Police Department, are the sole remaining defendants in an action brought by

James Bruning in the United States District Court for the District of Colorado, seeking damages under 42 U.S.C. § 1983 and state tort law. The district court dismissed all claims, both under § 1983 and state tort law, against the eight other named defendants, and all state tort law claims against the petitioners on motions for summary judgment.

Bruning claims that Robinson and Ferguson violated his rights under the Fourth and Fourteenth Amendments in October, 1986, when they submitted false affidavits to the county court to obtain an order requiring him to undergo nontestimonial identification procedures pursuant to Rule 41.1, Colo.R.Crim.P., and a warrant for his arrest on sexual assault charges arising from two rapes committed in June and September, 1986. After a preliminary hearing, the county court dismissed the charges which had been filed by the district attorney.

Bruning admits that the rapes occurred, and that the police officers' affidavits, on their faces, established probable cause for the issuance of the order and warrant. He challenges the veracity of the affidavits, claiming that the officers should not have believed the victim of the first rape when she identified him as the rapist. He also asserts that information material to the credibility of his identification by the victim wrongfully was omitted from the affidavits.

Robinson and Ferguson sought summary judgment based on qualified immunity, *Malley v. Briggs*, 475 U.S. 335, 344-345 (1986), showing that Bruning admitted having no evidence to support a critical element of his case: the intentional falsehood or reckless disregard with

which challenged portions of the affidavits were included or omitted by each police officer. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). The officers argued that Bruning's failure to sustain his burden as to this element was fatal to his case, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), and rendered all other issues immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).[1]

The district court determined the state tort law claims on the same facts, finding that since "the plaintiff has not shown that [the defendants'] acts or omissions were willful and wanton" (App., *infra*, 34a), Bruning had no evidence with which to overcome the officers' qualified immunity under state law. The district court denied the officers' qualified immunity from the § 1983 claim, however, stating,

> Neither jurors nor judges should be able to set standards of objective reasonableness where special knowledge, experience and training are involved in the defendant's conduct. Thus, the ultimate fact to be found is whether a reasonably competent police officer in the position of the defendants Robinson and Ferguson would have submitted these affidavits to the court in the belief that they were accurate and that they established probable cause. That question can only be decided after a full trial before a fair and impartial jury. (App., *infra*, 32a.)

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[1] *See*, Kennedy, J., concurring in *Siegert v. Gilley*, 500 U.S. ___, 111 S.Ct. 1789, 1795 (1991):

> Upon the assertion of a qualified immunity defense the plaintiff must put forward specific nonconclusory factual allegations which establish malice or face dismissal.

The district court concluded that Robinson's statement that the first victim "had an opportunity to observe the subject closely" was untrue because, although she had been able to provide a reasonably detailed description of the rapist, the victim had seen the rapist only for a short time in the rear view mirror of her car,[2] and was blindfolded during the rape itself.

The court stated that Robinson's quotation of the first victim's statement that when she saw Bruning enter her workplace one week after the rape, she "knew it was him," was "quite different from" statements she made to another officer in a recorded interview in October, 1986, more than three months after the rape. The court characterized these later statements as indicating that her identification at that time "was little more than speculation." The court did not find the challenged statement untrue.

Finally, the court noted that Robinson's affidavit did not mention the October interview. The court did not characterize any portion of the October interview as exculpatory.

The district court found that Ferguson's statement that he was not aware of any facts tending to exculpate Bruning

> could be a literal truth as the statement of a layperson; but it can be considered a gross distortion of the quality of the information relied on and the scope of the investigation made from the perspective of a reasonably competent law enforcement officer. (App., *infra*, 30a-31a.)

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[2] The rapist had hidden in the back seat.

The district neither reviewed the affidavits for probable cause according to the analytical guidelines set forth in *Franks v. Delaware* at 438 U.S. 171-172, nor ruled that the officers' immunity had been overcome by the plaintiff's evidence.

The officers appealed the district court's ruling to the United States Court of Appeals for the Tenth Circuit, arguing that the district court had erred in failing to follow the law as set forth in *Franks v. Delaware*.

The officers argued that the information found inaccurate by the district court was not material, since its exclusion would not have destroyed probable cause, *see, Franks v. Delaware* at 438 U.S. 172 at n. 8 (inaccuracies irrelevant if remainder of affidavit establishes probable cause); and that the omitted information, if believed, was neither exculpatory, *U.S. v. Fitzgibbon*, 619 F.2d 874, 876 (10th Cir. 1980), nor material because its inclusion would not have destroyed probable cause.[3] *Stewart v. Donges*, 915 F.2d 572, 582-583 (10th Cir. 1990).

The Tenth Circuit, concluding that the officers had "failed to make a prima facie showing that their conduct was objectively reasonable" (App., *infra*, 18a), affirmed, without ruling that the officers' qualified immunity had been overcome.

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[3] Each affidavit related that Bruning specifically had been identified as the rapist by the first victim in an interview with Petitioner Robinson and another officer on October 24, 1986. That identification was not challenged by competent evidence.

The court of appeals refused to consider whether the information which Bruning claimed had been omitted wrongfully from the affidavits was exculpatory,[4] and did not discuss whether clearly established law at the time of the affidavits, *Anderson v. Creighton*, 483 U.S. 635, 640-641 (1987), required the officers to include all non-exculpatory information in warrant applications. Nevertheless, the court concluded that the omitted information was material to the county court's finding of probable cause because the omissions "directly *undermine* Victim #1's alleged identification of Plaintiff as her assailant." (Emphasis added; App., *infra*, 16a.)

The court of appeals did not discuss the petitioners' showing that the plaintiff had no evidence with which to meet his burden of proving that either officer actually entertained doubts as to the truth of the victim's identification, *U.S. v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984), citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), nor did it consider the effect of that showing under *Mitchell v. Forsyth* or *Celotex v. Catrett*. The court of appeals left undisturbed the district court's ruling that the officers' qualified immunity was an issue of fact to be determined by the jury after trial on the merits.

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[4] In the district court the officers had argued that the challenged statements and omissions were irrelevant. *Easton v. City of Boulder*, 776 F.2d 1441, 1451 (10th Cir. 1985). The court of appeals ruled that whether the evidence was exculpatory had not been raised in the district court.

REASONS FOR GRANTING THE PETITION

I.

1. The Tenth Circuit has rendered a decision in conflict with decisions of this Court, *Illinois v. Gates*, 462 U. S. 213, 233-34 (1983); *see also, U.S. v. Harris*, 403 U.S. 573, 599 (1971), (Harlan, J., dissenting); and with decisions of six other circuits, *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7, 10 (1st Cir. 1984); *U.S. v. Fooladi*, 703 F.2d 180, 183 (5th Cir. 1983); *Clay v. Conlee*, 815 F.2d 1164, 1168 (8th Cir. 1987); *U.S. v. Mahler*, 442 F.2d 1172, 1174-1175 (9th Cir. 1971); *U.S. v. Johnson*, 713 F.2d 654, 660 (11th Cir. 1983); *Trimble v. U.S.*, 369 F.2d 950, 951 (D.C. Cir. 1966); and has reversed its own precedent, *Karr v. Smith*, 774 F.2d 1029, 1032 (10th Cir. 1985), by ruling that the officers must supply evidence which, though not exculpatory, might "undermine" the credibility of the victim's identification.

In *Franks v. Delaware*, this Court stated that an officer's statements in a warrant application must be

> " 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." 438 U.S. at 165.

The issue is whether the officers believed the information set forth in their affidavits, not whether the evidence was accepted by others at a later hearing or trial.

The confusion created by these conflicting decisions is illustrated by comparing the Tenth Circuit's decision in this case with that of the Eleventh Circuit in *Goodson v. City of Atlanta*, 763 F.2d 1381 (11th Cir. 1985).

In *Goodson*, the § 1983 plaintiff was identified as the rapist by the citizen-victim, as in this case. He did not

meet her earlier description of the rapist in several particulars, as in this case. His car did not meet her description of the rapist's car. The victim told the arresting officer that she had been raped two weeks earlier, although she had reported the rape four months earlier. 763 F.2d at 1384. The court of appeals found that the officers had probable cause to support the warrantless arrest, stating that, "The officer was confronted with what he could not ignore, [the victim's] personal identification." 763 F.2d at 1386.

Thus, information similar to that which established probable cause to support a warrantless arrest in the Eleventh Circuit subjects a police officer who obtained an order for nontestimonial identification (which, under state law, requires a showing *less than* probable cause) to § 1983 liability and damages in the Tenth Circuit.

Until this conflict is resolved by this Court, neither the petitioners nor any other police officers can know whether they are acting in conformity with, or violating, a citizen's Fourth Amendment rights when they apply for a warrant or consider making an arrest without a warrant.

2. The Tenth Circuit has decided a matter of federal law in conflict with a decision of a state court of last resort, where the matter arose from actions controlled initially by state law. In doing so, the court of appeals has subjected the officers to liability for failure to perform a duty which neither the district court nor the court of appeals has found to have been clearly established at the time the officers submitted their applications.

Under Colorado law, a police officer does not need to show either the credibility of the victim or the reliability

of information obtained from her to establish probable cause for an arrest. *People v. Henry*, 631 P.2d 1122, 1127 (Colo. 1981). No clearly established state law requires police officers applying for warrants to submit information which might undermine that presumed credibility and reliability. Nevertheless, the Tenth Circuit's decision subjects the officers to § 1983 liability and damages for failing to assume that they were required by the Fourth Amendment to impeach that which they did not have to establish in the first instance under clearly established state law.

In *Anderson v. Creighton*, 483 U.S. at 640-641, this Court held erroneous the Eighth Circuit's refusal to consider the specific circumstances of the officer's actions because the issue to be determined was whether the officer could reasonably, even if mistakenly, have believed that his actions did not violate clearly established law. The Tenth Circuit's failure to consider the specific circumstances of the case, and its requirement of legal prescience on the part of the police officers, require review by this Court.

3. The Tenth Circuit's ruling retroactively changes the standard by which police officers determine whether an item of information is material to a finding of probable cause. Before this ruling, the Tenth Circuit considered information material only if it established or destroyed probable cause. *Stewart v. Donges*, 915 F.2d at 582-583. (*See*, 582 at n. 13: "The omitted information must be so probative as to negate probable cause.") The Tenth Circuit's decision now declares material that information which a police officer would not have considered material under the law at the time of his actions, *Hunter v.*

Bryant, 502 U.S. ___, 112 S.Ct. 534, 537 (1991), because the information, if believed, does not destroy probable cause.

4. The circuit courts of appeal generally have held that an omission, as opposed to the wrongful inclusion, of evidence which is material to the finding of probable cause may constitute a basis for denial of qualified immunity. *Stewart v. Donges*, 915 F.2d at 582. The standard for determining when a warrant is deficient because of omitted evidence, particularly in light of the threshold standards of *Franks v. Delaware*, is the subject of a split among the circuits.

The Fourth circuit considers omitted information less likely to mislead a reviewing magistrate determining whether an affidavit states probable cause, and therefore requires a plaintiff to make a greater showing of harm as to claims of omission, *U.S. v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) than that required for claims of wrongful inclusion of false information. The Tenth Circuit's ruling in this case indicates that claims of omission may require a lesser showing from a plaintiff than claims asserting the inclusion of false information, since some non-exculpatory evidence now must be included in warrant applications. Only this Court can resolve these diametrically opposed rulings.

5. The state rule of criminal procedure which provides for the order for nontestimonial identification requires only suspicion "not amounting to probable cause." The state court of last resort has ruled the provision valid and not in conflict with either the state or federal constitution, *People v. Madson*, 638 P.2d 18, 31-33 (Colo. 1981); *People v. Harris*, 729 P.2d 1000, 1002 (Colo.

App. 1986) *affirmed*, 762 P.2d 651 (Colo. 1988), *cert. denied*, 488 U.S. 985 (1988). Therefore, the issues to be addressed on summary judgment should have been: (1) Was each officer's conduct, as determined according to the truthfulness standards set forth in *Franks v. Delaware*, and in light of the amount of evidence required for the order and warrant by the applicable state law rules, a violation of Bruning's rights under the Fourth and Fourteenth Amendments; and (2) If so, was the law so clearly established that each officer would have known that his conduct violated those rights?

These issues require review and determination by this Court because of their effect on the daily activities of police officers across the nation.

II.

1. The circuit courts of appeal have split on the question whether a defense of qualified immunity is to be determined by the court as a matter of law, or by the jury as a mixed question of law and fact. Some have ruled that qualified immunity must be determined as a matter of law by the court, *Finnegan v. Fountain*, 915 F.2d 817, 821 (2nd Cir. 1990); *Llaguno v. Mingey*, 763 F.2d 1560, 1569 (7th Cir. 1985); *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991), while some have found that objective reasonableness and probable cause are issues of fact, to be submitted to and determined by the jury at trial. *See, e.g., B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d at 10; *Thorsted v. Kelly*, 858 F.2d 571, 575 (9th Cir. 1988). The Eighth Circuit appears to have ruled both ways. *Compare, Gorra v. Hanson*, 880 F.2d 95, 97 (8th Cir. 1989) with *Morris v.*

Clifford, 903 F.2d 574, 579 (8th Cir. 1990). The Tenth Circuit's decision in this case affirms, without discussion, the district court's ruling that the officers' qualified immunity must be determined by the jury at trial. (App., *infra*, 32a).

Because this Court has held that qualified immunity is from trial itself and the burden of preparation therefor, *Mitchell v. Forsyth*, 472 U.S. at 526; *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982), and because the Tenth Circuit and some of its sister courts appear to have departed from this Court's rulings, clarification of the question whether qualified immunity is strictly a legal or a mixed legal and factual issue is necessary. The petitioners urge that the Court determine how factual disputes involving immunity, such as whether an officer's actions were intentional or committed with reckless disregard, are to be decided before trial.

CONCLUSION

The Tenth Circuit's decision has ignored the rulings of this Court on the application of qualified immunity, and has upset the balance between the rights of criminal suspects and the rights and needs of society as a whole which this Court has sought to maintain. *Harlow v. Fitzgerald*, 457 U.S. at 813-814; As Justice Scalia said in *Illinois v. Rodriguez*, 497 U.S. ___, 110 S.Ct. 2773, 2799 (1990), one who is forced to undergo a reasonable, but fruitless, search, "suffers one of the inconveniences we all expose ourselves to as the cost of living in a safe society; he does not suffer a violation of the Fourth Amendment."

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DON D. JACOBSON*
LOHF, SHAIMAN & ROSS, P.C.
Attorneys for Petitioners
950 South Cherry Street #900
Denver, Colorado 80222
(303) 753-9000

March, 1992.

*Counsel of Record.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JAMES BRUNING,

Plaintiff-Appellee,

v.

REID C. PIXLER, individually and in his official capacity as District Attorney for the Seventh Judicial District; JOSEPH S. PACYGA, individually and in his official capacity as Deputy District Attorney for the Seventh Judicial District; DISTRICT ATTORNEY'S OFFICE FOR THE STATE OF COLORADO'S SEVENTH JUDICIAL DISTRICT; FLOYD JOHNSON, individually and in his official capacity as Chief of the Gunnison Police Department; CITY OF GUNNISON POLICE DEPARTMENT; JAMES ROBERT KEEHNE; RUSSELL LOCKE; ROBERT G. RYAN,

Defendants.

and

KEITH ROBINSON; J. STEWART FERGUSON,

Defendants-Appellants.

No. 90-1296

(Filed Nov. 15, 1991)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 87-M-1600)

Submitted on the briefs:

Daniel M. Reilly and Larry Pozner, Denver, Colorado, for Plaintiff-Appellee.

Don D. Jacobson, Lohf, Shaiman & Ross, P.C., Denver Colorado, for Defendants-Appellants.

Before McKAY, Chief Judge, EBEL, Circuit Judge, and SAFFELS,** District Judge.

EBEL, Circuit Judge.

Defendants Keith Robinson and J. Stewart Ferguson appeal the district court's order denying their Motion for Summary Judgment based on qualified immunity.[1] Both Defendants are members of the Gunnison, Colorado, Police Department (GPD), who contend that they are immune from liability for their alleged wrongful acts in obtaining an order for nontestimonial identification and

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**Honorable Dale E. Saffels, Senior District Judge, United States District court for the District of Kansas, sitting by designation.

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

an arrest warrant for Plaintiff. "We review the denial of immunity *de Nova* as a final decision under 28 U.S.C. § 1291." *Snell v. Tunnell*, 920 F.2d 673, 675 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1622 (1991). Upon review, we conclude the district court properly denied Defendants' Motion for Summary Judgment.

I.

In the early hours of June 17, 1986, "Victim #1," who had just finished work at a grocery store in Gunnison, was sexually assaulted by a man who had hidden himself in the back of her car. Victim #1 reported the assault to Officer Keehne of the GPD, who failed to make any written or oral record of his conversation with Victim #1.

On June 25, 1986, Victim #1 saw Plaintiff, with whom she was acquainted, in the grocery store and was struck by his resemblance to her assailant. Victim #1 became upset, left work, and went to the GPD. She spoke with Officer Locke and Detective Robinson, but neither officer made any written or oral record of the conversation with Victim #1.

On September 5, 1986, Victim #2 was sexually assaulted in her home in Gunnison. She reported the assault to Officer Ryan of the GPD. Victim #2 was blindfolded throughout the assault and never saw her assailant.

On October 7, 1986, Durango Police Detective O'Connell, who was assisting with the investigation, interviewed Victim #1. Detective O'Connell tape recorded the

interview, and the recording was subsequently transcribed. During this interview Victim #1 described the assault and what she was able to see of the assailant as follows.

Victim #1 got into her car, which was parked at the grocery store, and turned on the dome light to get her cigarettes out of her purse. She sensed something in the back of her car and turned to see a man she did not know crouched in the back seat. Because he was able to crouch down so far, Victim #1 thought the man could not be very big: "Like five eight I think is pushin it." R. Vol. I, Doc. 6, Ex. C at 5. The man had a white handkerchief over his nose and mouth, so Victim #1 could not see his face below the bridge of his nose. She distinctly remembered that his eyes were icy blue, and described him as having a receding hairline, blondish hair, and a reddish complexion. When she looked at him, the man yelled at her to turn off the light, which she did. Victim #1 did not have an opportunity to see the man thereafter. He stayed behind her in the car while she drove to a deserted parking lot, at his direction, and while she got out of the car. Victim #1 was blindfolded during the assault and, at the assailant's direction, kept her head averted while he fled the scene.

During the interview with Detective O'Connell, Victim #1 said that she had been having nightmares about the assault and in them she knew the assailant. When asked who the assailant was in her dreams, she replied that it was different people. She also said she dreamed the assailant was her store manager one time, and that he was a customer in the grocery store in another dream, but she knew it was not really either of these people.

Victim #1 did not identify Plaintiff as the assailant, though in response to Detective O'Connell's statement: "It could well be that you will eventually recognize this guy," following the discussion of Victim #1's dreams, Victim #1 said:

[Victim #1]:	Well there is one person that gave, I've gave the name to the Police and stuff. It just freaked me out one day when he came in cause I know him, his girlfriend is one of the people I told I was working that night, you know, and.
Det. O'Connell:	Does he have receding blond hair?
[Victim #1]:	Yep.
Det. O'Connell:	And the icy blue eyes?
[Victim #1]:	Yep. And the build. And everything. And.
Det. O'Connell:	You could be right.
[Victim #1]	But it, I mean it bothers me but I can't even talk to this person anymore. You know.
Det. O'Connell:	Yeah. Well that's, even if it isn't him I'm sure he's gonna understand. He's too close to . . .
[Victim #1]	Yeah.
Det. O'Connell:	To the real thing, even if it isn't him.

Id. at 27. In response to Detective O'Connell's statement near the end of the interview: "You're still don't know who he is." Victim #1 responded "No." *Id.* at 30.

On October 24, 1986, Detective Robinson and Denver Police Detective Wallis interviewed Victim #1. They too failed to record the interview in writing or on tape. After the interview, Detective Robinson drafted an affidavit in support of an order for nontestimonial identification from Plaintiff in connection with the two assaults. Based on the affidavit, the court entered the order, which was carried out on October 27, 1986. Pursuant to the order, Plaintiff was required to give police samples of his fingerprints, blood, hair and saliva, to make a voice recording, and to be photographed.

On October 28, 1986, although all the samples from Plaintiff had not yet been analyzed, Officer Ferguson[2] drafted an affidavit in support of a warrant for Plaintiff's arrest for the two sexual assaults.[3] Plaintiff was arrested that day.

After the preliminary hearing, held on December 11, 1986, and January 22, 1987, the judge dismissed the charges for lack of probable cause. Plaintiff then brought this suit against Defendants and others for violation of

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[2] The record does not reveal Officer Ferguson's role in the investigation of either assault.

[3] The only evidence linking the two assaults together appears to be that in each assault the assailant held a knife to the victim's throat, blindfolded the victim, and wore what each victim thought was a nylon windbreaker. Also, the statements each victim reported the assailant made during the assault were similar.

his civil rights in connection with his arrest and prosecution.

II.

Plaintiff admitted that on their faces, Defendants' affidavits established probable cause. He contended, however, that the affidavits contained material false statements or omissions that Defendants made intentionally or with reckless disregard for the truth.

Specifically, Plaintiff alleged that Detective Robinson falsely and recklessly represented in his affidavit that Victim #1 had (1) positively identified Plaintiff as her assailant; (2) observed Plaintiff some days after the assault wearing grey sweatpants; (3) observed the color of Plaintiff's eyes; and (4) stated that Plaintiff's eyes were the same color as her assailant's. R. Vol. I, Doc. 1 at 3-4.

Plaintiff also alleged that Detective Robinson intentionally and maliciously failed to include in his affidavit the following information: (1) in the brief moment Victim #1 saw the assailant, he wore a mask over his face; (2) Victim #1 only saw the assailant's face above the bridge of his nose; (3) Victim #1 gave an extensive recorded statement to Detective O'Connell on October 7, 1986, for the purposes of identifying the assailant; (4) even though she knew Plaintiff before the assault, Victim #1 did not identify Plaintiff as her assailant during this interview; (5) in the interview Victim #1 said she did not know who assaulted her; (6) Victim #1 told Detective O'Connell that the man who assaulted her was not more than 5' 8"; (7) Plaintiff is 5' 11"; (8) Victim #1 described her assailant as being of slim to medium build; (9) Plaintiff weighs 190

pounds; (10) Victim #1 told Detective O'Connell her assailant had icy blue eyes; (11) Plaintiff has hazel eyes; (12) Victim #1 told Detective O'Connell she thought the man who assaulted her might be a person who worked at the Standard Gas Station in Gunnison; and (13) Victim #2 was blindfolded throughout her assault and could not identify her assailant. *Id.* at 4-5.

Plaintiff alleged that Officer Ferguson's affidavit contained the same false statements and omissions. Plaintiff claimed that by their misrepresentations, Defendants violated his rights under the Fourth and Fifth Amendments.

Defendants moved for summary judgment claiming qualified immunity under *Malley v. Briggs*, 475 U.S. 335 (1986). The Court held in *Malley* that an officer is immune from liability for his actions in seeking a warrant unless "a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court adopted an objective standard for qualified immunity. Under the *Harlow* standard, government officials will not be liable for their conduct when performing discretionary functions unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. "Because of the important values protected by qualified immunity, the procedures to be followed when this particular affirmative defense is raised differ from those applicable to most other affirmative defenses." *Powell v. Mikulecky*, 891 F.2d 1454, 1457 (10th Cir. 1989).

When a government official raises the defense of qualified immunity in a motion for summary judgment, the plaintiff must produce facts "sufficient to show both that the defendant's alleged conduct violated the law and that that law was clearly established when the alleged violation occurred." *Pueblo Neighborhood Health Ctrs. Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). Only after the plaintiff has met this burden must the defendant bear the usual summary judgment movant's "burden of showing that no material issues of fact remain that would defeat his or her claim of qualified immunity." *Id.; see also Powell*, 891 F.2d at 1457.

This procedure must be modified slightly, however, when the plaintiff's claim contains a subjective element, such as the defendant's purpose, motive, or intent. Prior to *Harlow*, the qualified immunity standard had both a subjective and an objective component. *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The subjective component focused on the good faith of the official and relieved him from liability if he did not actually know his conduct was unconstitutional and did not act with malicious intent. *Harlow* eliminated any consideration of the defendant's intent. *Harlow* eliminated any consideration of the defendant's intent as it relates to his knowledge of the law, *see Halperin v. Kissinger*, 807 F.2d 180, 186 (D.C. Cir. 1986), but did not preclude consideration of the defendant's intent when his state of mind is an essential element of the plaintiff's substantive claim, *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 648.

When a defendant moves for summary judgment asserting he is qualifiedly immune and his state of mind is an element of the plaintiff's claim, he must do more

than merely raise the immunity defense; he "must make a prima facie showing of the 'objective reasonableness' of the challenged conduct." *Lewis v. City of Ft. Collins*, 903 F.2d 752, 755 (10th Cir. 1990) (citing *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 649; *Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1434 (D.C. Cir. 1987)). If the defendant makes this prima facie showing, the plaintiff must then produce specific evidence of the defendant's culpable state of mind to survive summary judgment. *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 649.

At the time Defendants drafted the affidavits at issue, the law was clearly established that an officer would violate a plaintiff's Fourth and Fourteenth Amendment rights by knowingly or recklessly making a false statement in an affidavit in support of an arrest or search warrant, if the false statement were material to the finding of probable cause. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984) (applying *Franks v. Delaware* standard to civil rights case involving arrest warrant). The law also was clearly established that "to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause," would violate a plaintiff's Fourth and Fourteenth Amendment rights. *Stewart v. Donges*, 915 F.2d 572, 582-83 (10th Cir. 1990).

A reckless disregard for the truth in the context of an alleged Fourth Amendment violation under *Franks v. Delaware* is the same as that in the context of an alleged First Amendment violation. A plaintiff must prove that "the affiant 'in fact entertained serious doubts as to the truth of his' allegations." *United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984) (quoting *St. Amant v. Thompson*, 390

U.S. 727, 731 (1968)), *cert. denied*, 470 U.S. 1003 (1985); *accord DeLoach v. Bevers*, 922 F.2d 618, 622 (10th Cir. 1990), *cert. denied*, 112 S.Ct. 65 (1991). "Recklessness may be inferred from omission of facts which are 'clearly critical' to a finding of probable cause."[4] *DeLoach*, 922 F.2d at 622 (quoting *Hale v. Fish*, 899 F.2d 390, 400 (5th Cir. 1990); *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir. 1986)).

Because the state of mind with which Defendants allegedly acted was an element of Plaintiff's claim, Defendants had to make a prima facie showing that their actions were objectively reasonable. Defendants, however, did not submit any materials in support of their Motion for Summary Judgment. They did not file any affidavits attesting to their good faith, *Martin*, 812 F.2d at 1434, or establishing the objective reasonableness of their conduct, *Lewis*, 903 F.2d at 755. Instead, Defendants merely argued that Plaintiff could not establish their culpable state of mind and that any alleged false statements or omissions were not material to a finding of probable cause. On this record, it does not appear that Defendants made a prima facie showing that their conduct was objectively reasonable.

Moreover, Plaintiff came forward with specific evidence from which one could infer that Defendants recklessly made false statements in, and omitted material information from, their affidavits. As Plaintiff's expert witness said in an affidavit attached to Plaintiff's Brief in

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[4] This statement, of course, assumes that the affiant was aware of such omitted facts.

Opposition to Defendant-Police Officers' Motion for Summary Judgment, "the only material evidence in [Officer Ferguson's] affidavit linking [Plaintiff] to the offenses enumerated in the affidavit is the alleged identification of [Plaintiff] by one of the victims, [Victim #1]." R. Vol. I, Doc. 6, Ex. G at 2. Plaintiff pointed to evidence within Defendants' knowledge that clearly indicated Victim #1 could not positively identify Plaintiff, or any one else, as her assailant.

In denying Defendants' Motion for Summary Judgment, the district court focused on the following statements or omissions that it concluded were actionable: (1) Detective Robinson's statement that Victim #1 said she "had an opportunity to observe the subject closely," R. Vol. I, Doc. 6, Ex. B at 1; (2) Detective Robinson's statement that Victim #1 " 'knew it was him,' " when she saw Plaintiff in the grocery store on June 25, 1986, *id.*; (3) Detective Robinson's failure to mention Detective O'Connell's interview with Victim #1; and (4) Officer Ferguson's statement that he was "not aware of any other facts which would tend to exculpate [Plaintiff]," *id.* at Ex. D, p. 3. The district court also concluded that Officer Ferguson's affidavit suffered from the same deficiencies as Detective Robinson's affidavit.

Defendants argue that Detective Robinson's statement that Victim #1 had an opportunity to observe her assailant closely is true, as evidenced by her ability to describe the assailant in some detail. The statement is clearly misleading, however, in light of the information Detective Robinson omitted from his affidavit: that the man was wearing a handkerchief that concealed his face from the bridge of his nose down, and Victim #1 only saw

him briefly by the light of her dome light while he was crouched down in her back seat. The omitted information casts substantial doubt on Victim #1's ability to identify Plaintiff as her assailant and, therefore, is material to a finding of probable cause.

Defendants also contend that Detective Robinson's statement that Victim #1 said she "knew it was him" when she saw Plaintiff on June 25, 1986, is true. In their interview with Victim #1 after her encounter with Plaintiff on June 25th, however, neither Detective Robinson nor Officer Locke wrote down what Victim #1 told them. Officer Locke testified in his deposition that if Victim #1 had positively identified her assailant, he would have written it down. Furthermore, although Victim #1 allegedly identified Plaintiff as her assailant in this interview, the record does not reflect that the GPD took any action on this information until October 24, 1986. Both of these pieces of circumstantial evidence are sufficient to create an issue of fact as to whether Victim #1 actually made the statement Detective Robinson attributed to her in his affidavit. The statement is material, as it constituted a positive identification of Plaintiff as Victim #1's assailant. Also, one could infer from the GPD's failure to act on the information Victim #1 provided in the interview that Detective Robinson did not believe the information was sufficient to link Plaintiff to the crime.

Defendants contend that pursuant to *Easton v. City of Boulder*, 776 F.2d 1441 (10th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986), they were not required to discuss in their respective affidavits any of the statements Victim #1 made in her interview with Detective O'Connell because

even if those statements were inconsistent or contradictory to the statements she allegedly made in the June 25th and October 24th interviews, they would not nullify probable cause. Defendants' interpretation of *Easton* is too broad.

Easton involved an alleged sexual assault on two young boys by a man who lived in their apartment complex. When the first detective interviewed the boys separately, each described going to the man's apartment where a nonviolent sexual assault occurred and later going to the laundry room with the man where he made a tent out of a blanket and assaulted one of the boys again. Each boy identified the man's apartment to the detective and together they took the police to the laundry room. There, the detective found a blanket, which the boys said was the one the man used to make a tent. The detective then contacted the building manager to determine who lived in the apartment the boys had identified. The manager said Daniel Easton lived in the apartment. *Id.* at 1443-44.

A week later, a second detective, who was experienced with juveniles, interviewed one of the boys again. At that time, the boy recalled only the incident in the laundry room. Although he denied being in the man's apartment, he identified the same apartment as the man's residence. The boy's description of what occurred in the laundry room remained consistent with his earlier account, however, and his description of the man was consistent with that given by the complex manager. At the end of the interview, the boy's stepfather saw a man coming out of his apartment across the complex and asked the boy if that man was the assailant. The boy

responded "yes." Thereafter, police approached the man and asked him his name. He identified himself as Daniel Easton. *Id.* at 1444.

Later that day, the detective interviewed the other boy again. His account of the laundry room incident was consistent with all other accounts. He again related that the boys were in the man's apartment, but denied that any assault took place there. He described the man as having lighter hair than the other boy did. *Id.* After the interview, the detective who first interviewed the children drafted an affidavit for Easton's arrest with the assistance of the second detective. The detective did not reveal in his affidavit that the first boy's statements as to whether he had been in Easton's apartment and whether he had been assaulted in Easton's apartment were contradictory, or that the two boys' descriptions of the assailant's hair color varied slightly. *Id.* at 1449.

> We concluded that the omitted inconsistencies
>
> d[id] nothing to undermine the solid core of the children's statements regarding the laundry room assault and the location of the perpetrator's apartment. Nor d[id] they detract from the detectives' impression, based on personal observation of [the first boy's] demeanor and behavior, that his statements were spontaneous and revealed knowledge of things that a child his age could not possibly possess had an event of the kind described not occurred.

Id. at 1450. We also noted that "[t]he detectives did not need [the first boy's] statement about a further assault in the man's apartment to establish probable cause *and did not rely on it in the affidavit they submitted to [the judge].*" *Id.*

at 1450-51 (emphasis added). We therefore held that "because the evidence excluded in no way alter[ed] the fact that the evidence included state[d] probable cause, the warrant was valid, whatever the intent of the officers, and Easton suffered no harm." *Id.* at 1451.

In contrast, the omissions here directly undermine Victim #1's alleged identification of Plaintiff as her assailant. That identification was virtually the only evidence linking Plaintiff to either of the assaults, and without it, there would be no probable cause to believe Plaintiff was the assailant. Defendants' interpretation of *Easton* as holding that an officer need never report an inconsistency in the statements of a victim or witness is completely unreasonable. *See also Stewart*, 915 F.2d at 583 (holding law was clearly established in December of 1985 that the victim's alleged recantation of his accusation was highly material to a finding of probable cause).

On appeal, Defendants argue that Officer Ferguson's statement that he was unaware of any evidence exculpating Plaintiff was true. They contend that exculpatory evidence is that which positively eliminates the defendant as the perpetrator, and none of the evidence Plaintiff claims Officer Ferguson omitted from his affidavit concerning Victim #1's ability to identify Plaintiff and how well Plaintiff fit Victim #1's description of the assailant tended to show Plaintiff could not be the assailant. Appellant's Reply Brief at 8-13. Defendants did not raise this argument as to the meaning of "exculpatory" evidence in the district court, however, so we will not consider it on appeal. *Gillihan v. Shillinger*, 872 F.2d 935, 938 (10th Cir. 1989); *see also Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 887 (10th Cir. 1991) ("We are not

obligated to address an argument which was not made in the district court, nor even in this court until the reply brief.").

Officer Ferguson knew Victim #1 made statements to Detective O'Connell that undermined her ability to identify Plaintiff as her assailant and he knew that Plaintiff did not fit Victim #1's description of the assailant in all respects, including that he had hazel rather then "icy blue eyes," yet he not only failed to set forth this information in his affidavit, he positively stated he was unaware of any facts tending to exculpate Plaintiff. Officer Ferguson's statement was not only false and misleading, but material to the finding of probable cause.

In his affidavit, Plaintiff's expert witness, a former police officer and chief investigator for a District Attorney's Office, opined that under the circumstances,

> the information relied upon by [Officer Ferguson] in the preparation of the affidavit for issuance of an arrest warrant was so obviously contraindicated as to the positive identification of [Plaintiff] by [Victim #1], that to include it in the affidavit without qualification or explanation constitutes a deviation from what an objective and reasonable police officer would consider appropriate in like circumstances.

R. Vol. I, Doc. 6, Ex. G at 4. Detective Robinson's affidavit suffered from the same deficiencies as Officer Ferguson's affidavit.

The statements Defendants made in their affidavits and the information they omitted from those affidavits concerned facts that were "clearly critical" to a finding of probable cause. A factfinder could infer that Defendants

made the statements and omitted the information with reckless disregard for the truth. *See DeLoach*, 922 F.2d at 622.

III.

In conclusion, Defendants failed to make a prima facie showing that their conduct was objectively reasonable, while Plaintiff pointed to specific evidence that Defendants' conduct violated clearly established rights of which a reasonable officer would have known. Therefore, the district court properly denied Defendants' Motion for Summary Judgment. The ruling of the United States District Court for the District of Colorado is AFFIRMED, and the action is REMANDED for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-1600

JAMES BRUNING,
Plaintiff,

v.

REID C. PIXLER, individually and in his official capacity as District Attorney for the Seventh Judicial District and JOSEPH S. PACYGA, individually and in his official capacity as Deputy District Attorney for the Seventh Judicial District, DISTRICT ATTORNEYS OFFICE FOR THE STATE OF COLORADO'S SEVENTH JUDICIAL DISTRICT, FLOYD JOHNSON, individually and in his official capacity as Chief of the Gunnison Police Department, CITY OF GUNNISON POLICE DEPARTMENT, JAMES ROBERT KEEHNE, RUSSELL LOCKE, ROBERT G. RYAN, KEITH ROBINSON, and J. STEWART FERGUSON,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Sep. 26, 1990)

MATSCH, Judge

On October 24, 1986, Detective Keith Robinson of the Gunnison, Colorado, Police Department, submitted an affidavit to a County Court judge as support for an order for non-testimonial identification of James Bruning for

investigation of two rapes reported to the Gunnison Police Department. The pertinent paragraphs of the affidavit are as follows:

> (1) There is probable cause to believe an offense has been committed, Sexual Assault in the first degree, C.R.S. 1973, 18-3-402 (F-2), in Gunnison County, Colorado on June 17, 1986 at approximately 1 AM as [Victim #1] was leaving her place of employment, City Market, which is located in the City and County of Gunnison, [Victim #1] entered her locked maroon Honda Accord, and while sitting on the driver's seat she turned on the car's dome light and discovered a male subject in the back seat. [Victim #1] had an opportunity to observe the subject closely. The subject threatened [Victim #1] with a knife, ordered her to turn off the light, and ordered her to drive to a nearby bank parking lot where he ordered her out of the car and did sexually assault her, threatening her with a knife. During this attack he did blindfold her, and did bind her wrists. He ordered her to "tell me that you like it", also questioning her about boyfriends, and admiring her body. After the assault, [Victim #1] contacted the police, reporting the crime and describing the perpetrator as a white male in his twenties having receding brownish-blond hair, blue eyes, and wearing a blue nylon windbreaker and gray sweatpants.
>
> (2) On or about June 25, 1986 [Victim #1] was working at City Market when she observed a party known to her as "Jim" enter City Market. [Victim #1] greeted him and observe he quickly turned away from her without responding. She then noticed that he was wearing a blue nylon windbreaker and gray sweatpants. She also

noticed this person had identical hair color and style and eyes as the person who had sexually assaulted her. [Victim #1] reported that at this time, she "knew it was him", meaning the person who had sexually assaulted her.

(3) [Victim #1] reported that "Jim" is the boyfriend of Monica Gustafson, who she is acquainted with, and has met "Jim" on three occasions socially and was told that he worked at AJ Upholstery in Gunnison.

(4) On 09-05-86, [Victim #2] reported that at approximately 12:30 AM, as she slept on her sofa, a male party unknown to her entered her residence, 509 West Virginia, which was then and is now located in the City and County of Gunnison, and sexually assaulted her at knifepoint. During this assault, in which the victim was blindfolded and bound at the wrists, the suspect instructed her to say to him "tell me you want me to fuck you", and also questioned her about her boyfriend, and admired her body. In this attack, the knife was described as a utility knife.

(5) On 10-24-86, your affiant met with victim, [Victim #1], who reported that she had been reluctant to come forward and inform the police about her identification of the suspect because Monica is a friend. Through investigation, your affiant learned that "Jim", the boyfriend of Monica Gustafson, is James A. Bruning, DOB 08-03-58, one of the owners of AJ's Upholstery. Your affiant know[n]s that linoleum knives and utility knives are common tools in the upholstery trade.

Exhibit B to Plaintiff's Brief.

The County Court entered an order under Rule 41.1 of the Colorado Rules of Criminal Procedure, requiring Mr. Bruning to provide blood, saliva and hair specimens, fingerprints, voice recordings and to be photographed. That order was carried out on October 27, 1986.

On October 28, 1986, Officer J. Stewart Ferguson signed an affidavit for the issuance of a warrant to arrest James Bruning on charges of sexual assault in the first degree, second degree kidnaping, first degree sexual assault and first degree burglary. In that affidavit, Officer Ferguson described the two reports of rape and included the following paragraphs:

> (2) On June 17, 1986 [Victim #1] reported to Officer Keehne of the Gunnison Police Department that she had been raped. [Victim #1] reported to Officer Keehne that on June 17, 1986 at approximately 1:00 AM she left work at City Market, located at 400 West Virginia Avenue, Gunnison, Gunnison County, Colorado, and got into her car which was parked in the City Market parking lot. [Victim #1] stated that when she got into her car she turned on the dome light and discovered a person in the rear seat. She described the person as a white male, slim to medium build, average height, with straight blond hair, mustache, and sweat pants. She reported that the subject threatened her with a knife, ordered her to turn off the light, and directed her to drive to Columbia Savings and Loan, located at 200 North Spruce Street, Gunnison, Gunnison County, Colorado, where he ordered her out of the car and to a nearby dark area where he forced her to engage in sexual intercourse with him.

(2) In subsequent interviews with Det. Locke, Gunnison Police Department, and Det. O'Connell, Durango Police Department, [Victim #1] described the suspect as having blond hair, receding or thinning in the front, blue eyes, a mustache, a reddish complexion, and wearing a blue nylon windbreaker-type jacket, gray sweat pants, and a white handkerchief over his mouth and nose. She also reported that the suspect had an unusual odor about him, kind of outdoorsy, and that he had hairy legs.

(3) In an interview with Det. Robinson, [on 10-24-86] Gunnison Police Department, following up on earlier remarks made by [Victim #1], [Victim #1] stated she had seen the person who sexually assaulted her several days later while she was working in City Market. She reported that "Jim", the boyfriend of Monica Gustafson, an acquaintance, had entered the store and that when she greeted him he looked away without responding. She then noticed that he was wearing a blue nylon windbreaker, gray sweat pants, and that he had blond hair that was receding and blue eyes. She reported that she then suddenly realized that he was the person who sexually assaulted her on June 17, 1986. She reported that she immediately became very excited and unable to continue work, calling for someone to take her place for the remainder of the day.

(4) [Victim #1] reported further that she recalled that Monica Gustafson had been in City Market the evening before the assault and that Ms. Gustafson was the only person other than the store employees she told about working late that night. [Victim #1] stated that "Jim" was Ms. Gustafson's boyfriend and that he worked at

> AJ's Upholstery. She also advised that Ms. Gustafson works for Western State College.
>
> (5) Sgt. Ferguson, Gunnison Police Department, contacted Robert Goodnough, Western State College Business Office, and asked if he was acquainted with Monica Gustafson and if he knew her boyfriend. Mr. Goodnough advised he knew Ms. Gustafson and called back to report that her boyfriend was Jim Bruning who owns AJ's Upholstery. Police Department records revealed that James A. Bruning is a co-owner of AJ's Upholstery.

Exhibit D to Plaintiff's Brief.

The affiant also referred to the photographing on October 27, 1986 and said that he observed an unusual feature, possibly a scar on Mr. Bruning's tongue in the photographs taken of him. The significance of that statement comes from the report of Victim #2 that her assailant had a very distinctive feature or scar on his tongue.

James Bruning was arrested and went to a preliminary hearing on December 11, 1986. That hearing was continued on January 22, 1987, and, at the close of the hearing, the judge dismissed the charges for lack of probable cause.

James Bruning has filed a complaint asserting claims for relief under 42 U.S.C. §§ 1983 and 1985 together with pendent claims for malicious prosecution, false arrest and imprisonment, negligence, negligent infliction of emotional distress and outrageous conduct. Reid C. Pixler was dismissed from the action by stipulation. The defendants have filed motions for summary judgment and the

plaintiff moved for partial summary judgment. At the hearing on these motions, the plaintiff voluntarily dismissed his claims against the district attorney's office, Floyd Johnson, James Robert Keehne and Robert G. Ryan.

The plaintiff's Section 1983 claims against defendants Robinson and Ferguson are based on their respective affidavits which are asserted to be false and an infringement of plaintiff's constitutionally protected rights as clearly established by *Franks v. Delaware*, 438 U.S. 154 (1978). These defendants claim qualified immunity under *Malley v. Briggs*, 475 U.S. 335 (1986).

The first question is whether the plaintiff has shown a violation of *Franks v. Delaware*. The plaintiff's contention is that both officers misrepresented the identifications made by Victim #1. There is uncertainty about what she said in her initial report to Officer Locke on June 17, 1986, because he did not take notes or make a written report of the conversation. Victim #1 went to the Gunnison Police Department on June 25, 1986, to report her observation made earlier on that day. She talked to Officers Locke and Robinson. Neither made a record or report of what she said. Officer Locke testified at his deposition that he made no written record of the June 25 interview but that he would have done so if Victim #1 had made a positive identification of her assailant. At the request of the prosecutors, Detective Robinson wrote a memorandum on December 10, 1986, the eve of the preliminary hearing, as follows:

SUPPLEMENTAL REPORT

Det. Robinson 12-10-86 86-1073

During the pretrial conference it was learned that no report had been made concerning [Victim #1] coming to the police department in June to report seeing a suspect in City Market.

I was present in the office with Russ Locke when [Victim #1] came into the office. [Victim #1] was visibly upset. [Victim #1] advised that she had observed a subject in the store that she thought was the pe[r]son who assaulted her. Upon seeing this person she became upset and left work coming to the police department. [Victim #1] identified the subject as being the boyfriend of a friend and worked at AJ's Upholstery.

There is a written transcript of a lengthy interview of Victim #1 by Durango Detective Sharon O'Connell on October 7, 1986, referred to in Ferguson's affidavit of October 24, 1986. During that interview, the victim described the event in considerable detail. She distinctly remembered that her assailant had icy blue eyes. She also made the following comments about her ability to identify him:

[Victim #1]: And that's what really scares me cause I've drempt [sic] that, like I've drempt [sic] that it's my manager at the store, which I know it's not but in my dream it's you know, or somebody that I've been waiting on out at Tomichi or something but I know it's not these

	two people but in my dream I know who it is.
Det. O'Connell:	It could well be that you will eventually recognize this guy.
[Victim #1]:	Well there is one person that gave, I've gave the name to the Police and stuff. It just freaked me out one day when he came in cause I know him, his girlfriend is one of the people I told I was working that night, you know, and.
Det. O'Connell:	Does he have receding blond hair?
[Victim #1]:	Yep.
Det. O'Connell:	And the icy blue eyes?
[Victim #1]:	Yep. And the build. And everything. And . . .
Det. O'Connell:	You could be right.
[Victim #1]:	But it, I mean it bothers me but I can't even talk to this person anymore. You know.

Exhibit C to Plaintiff's Brief, pp. 82-83.

The detailed description of the assault given to Detective O'Connell by Victim #1 makes it clear that she did not have "an opportunity to observe the subject closely" because he wore a handkerchief over his nose and mouth in the car, stayed behind her until she was blindfolded and kept the blindfold on her during the sex acts.

On October 30, 1986, Victim #1, accompanied by her lawyer, met with District Attorney Pixler, Assistant District Attorney Pacyga and Officer Ferguson. At that meeting, she said that she could not positively identify James Bruning as her assailant and that the police had apparently misunderstood her earlier statements. Pacyga testified in his deposition that he then concluded that the affidavits did not accurately reflect the victim's present ability to identify James Bruning. The parties elected not to take the deposition of Victim #1 in this civil action. It has not been disputed that James Bruning has hazel eyes, a fact which was observable during the court ordered photographing on October 27, 1986.

The final paragraph of defendant Ferguson's October 29, 1986, affidavit states:

> "I am not aware of any other facts which would tend to exculpate James Allen Bruning."

Exhibit D to Plaintiff's Brief

Plaintiff has submitted an affidavit of Rand B. Hendrickson, a former Denver police officer and chief investigator for the district attorney for the Second Judicial District in Colorado. In that affidavit, Mr. Hendrickson expressed the opinion that the affidavit for arrest warrant contained sufficient information to issue the arrest warrant but that his conclusion was based directly on the reported identification of Bruning by Victim #1. Mr. Hendrickson believed that without the statements of a positive identification of Bruning by Victim #1, the affidavit would be insufficient to show probable

cause. In his view, the affidavit ignored the victim's statements in her interview with Det. O'Connell and the failure of police officers to record and act on the statement of identification made on June 25, 1986, cast doubt on the veracity of the officers' statements. Mr. Hendrickson opined that if such an identification had been made that failure to record and act would constitute professional incompetence.

The plaintiff has also submitted the affidavit of Pat Delaney, who was the Assistant District Attorney assigned to assist Mr. Pacyga at the preliminary hearing in the Bruning case. Mr. Delaney recalled that on December 11, 1986, an attorney representing Victim #1 told Mr. Delaney that it was not true that his client had positively identified James Bruning as the rapist as represented in the affidavits. Mr. Delaney included this statement in his affidavit:

> "Moreover, had the affidavits of the police officer properly reflected the nature and extent of [Victim #1's] testimony, I would never have filed this case."
>
> Exhibit F to Plaintiff's Brief

To avoid summary judgment, the plaintiff must show that he had sufficient evidence to support a jury finding that the affidavits were false in material respects and that the falsity resulted from deliberate falsehoods or reckless disregard for the truth by the affiants. Falsity may be shown not only by what is misrepresented but also by what is omitted. See citations of authority in *United States v. Williams*, 737 F.2d 594, 604 (7th Cir. 1984).

As previously noted, contrary to the statement in paragraph 1 of the Robinson affidavit, Victim #1 did not have an opportunity to observe the subject closely. The statement in paragraph 2 of that affidavit that Victim #1 "knew it was him" when she saw James Bruning on June 25, 1986, is quite different from the recorded statements of this victim made to Det. O'Connell. The credibility of that statement is further eroded by the failure of the officers to make any report of their conversation with Victim #1 on June 25, 1986, particularly in view of Officer Locke's testimony that he would have made a record of a positive identification. The Robinson affidavit makes no mention of the interview with O'Connell and a fair reading of that interview transcript would support a finding that the victim's identification of Bruning was little more than speculation, primarily based on her attributing significance to her statement to Monica Gustafson that the victim would be working late that night. The record is not clear as to what Victim #1 said at the October 24, 1986 interview, except for the statement that she had been reluctant to come forward and inform against Monica's friend. Given the very limited information available to him on October 24, 1986, a jury could find that Det. Robinson's affidavit was made with reckless disregard for the truth of the representations concerning Victim #1's ability to identify James Bruning as her assailant and that the affidavit was materially false.

The Ferguson affidavit is primarily based upon the same statements of Victim #1 and suffers from the same deficiencies. Additionally, Officer Ferguson's denial of awareness of any exculpatory facts could be a literal truth as the statement of a layperson; but it can be considered a

gross distortion of the quality of the information relied on and the scope of the investigation made from the perspective of a reasonably competent law enforcement officer. The plaintiff has met his burden of demonstrating evidentiary support for the violation of clearly established law by Officers Robinson and Ferguson in submitting false affidavits.

The next question is whether the evidence can overcome the defendants' assertion of qualified immunity under the *Malley v. Briggs* standard. Accordingly, the particular question is whether the plaintiff has made a sufficient showing that the jury could find, on an objective basis, that no reasonably competent officer would believe that Victim #1 had sufficiently identified James Bruning as her assailant to support a finding of probable cause justifying his arrest. That question must be resolved under the totality of the circumstances. The officers have a duty to evaluate the credibility of a complaining witness and the information she gives them. In this case, the officers seek to avoid responsibility by accepting two identifying statements, made on June 25, 1986, and October 24, 1986, of a frightened young woman experiencing the aftershocks of a forcible rape in a small community where that is an extraordinary crime. The failures of the police to obtain and preserve physical evidence and to report and record information given to them colors their credibility in their recollection of the statements upon which they relied as well as that of their informant.

Plaintiff's witness Hendrickson has expressed the professional opinion that the police work done in this investigation was incompetent and that the inclusion of the report of a positive identification of James Bruning by

Victim #1 in these affidavits would not have been done by a reasonably competent police officer. The defense of qualified immunity presents a legal question presented on motions for summary judgment. While the court has the responsibility to evaluate the quality and quantity of the plaintiff's evidence in determining that question, recognizing that the doctrine of qualified immunity includes immunity from trial, the plaintiff must not be deprived of the opportunity to have factual disputes determined by the jury as the constitutional trier of fact in cases brought under Section 1983. In matters involving professional judgment, opinion testimony is of extreme importance and that is true in this case. Neither jurors nor judges should be able to set standards of objective reasonableness where special knowledge, experience and training are involved in the defendant's conduct. Thus, the ultimate fact to be found is whether a reasonably competent police officer in the position of the defendants Robinson and Ferguson would have submitted these affidavits to the court in the belief that they were accurate and that they established probable cause. That question can only be decided after a full trial before a fair and impartial jury.

The plaintiff has failed to show adequate support for liability of the City of Gunnison because he has not offered any competent evidence that the police officers were acting pursuant to any established regulations, custom or practice of the City. The only evidence against Officer Russell Locke is his failure to record and report the statements made by Victim #1 to him on June 17 and June 25, 1986, and his failure to preserve physical evidence such as the clothing she wore at the time of the

attack. At best, that demonstrates negligence in performing police duties but that is an insufficient predicate for liability in this particular case.

The claim against Joseph S. Pacyga is based upon a contention that he acted outside the scope of the absolute immunity granted to prosecutors as officers of the court under *Imbler v. Pachtman*, 424 U.S. 409 (1976). It is undisputed that Mr. Pacyga reviewed the subject affidavits to comply with a standing state court order requiring the district attorney's office to screen such affidavits before submission to the court. The plaintiff has offered nothing to show that Mr. Pacyga had the same knowledge as the police officers or that he had any reason to disbelieve the statements made in the affidavits. Accordingly, his view of them would be the same as the plaintiff's expert witness, Mr. Hendrickson. Therefore, Mr. Pacyga cannot be liable for a *Franks v. Delaware* violation. While he had additional information before proceeding with prosecution of the charges, the decision to go forward was made as a lawyer, an officer of the court, which is within the absolute immunity provided by *Imbler v. Pachtman*.

The plaintiff's claim under 42 U.S.C. § 1985(3) is legally insufficient because there is no allegation or evidence of a class or race-based animus as required under *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981).

The plaintiff's pendent claims for relief under state law are barred by the official immunity granted by the Colorado Governmental Immunity Act, C.R.S. § 24-10-118(2). The named defendants were all acting

during the performance of their duties and within the scope of their employment and the plaintiff has not shown that their acts or omissions were willful and wanton.

The plaintiff filed his motion for partial summary judgment on the claim that the finding of no probable cause at the preliminary hearing in the state court criminal proceedings should have a collateral estoppel effect on this proceeding. The motion must be denied because the issues are different. The preliminary hearing decided that no probable cause existed at the time of the preliminary hearing, based upon all of the evidence then before the court. The issue in this case is whether the remaining defendants, Officers Robinson and Ferguson had objective probable cause to believe that their affidavits were sufficient at the time they were signed.

Upon the foregoing, it is

ORDERED that this civil action is dismissed as to all of the defendants and all of the claims excepting for the claims against the defendants Keith Robinson and J. Stewart Ferguson, individually, under 42 U.S.C. § 1983, based on their respective affidavits and it is

FURTHER ORDERED that the plaintiff's motion for partial summary judgment is denied. It is

FURTHER ORDERED that a status conference will be held on October 18, 1990, at 10:00 a.m. in the Conference Room, Second Floor, Post Office Building, 19th and Stout

Streets, Denver, Colorado, to discuss further proceedings on the remaining claims.

Dated: September 26, 1990

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES BRUNING, Plaintiff-Appellee, v. REID C. PIXLER, individually and in his official capacity as District Attorney for the Seventh Judicial District and JOSEPH S. PACYGA, individually and in his official capacity as Deputy District Attorney for the Seventh Judicial District, DISTRICT ATTORNEY'S OFFICE FOR THE STATE OF COLORADO'S SEVENTH JUDICIAL DISTRICT, FLOYD JOHNSON, individually and in his official capacity as Chief of the Gunnison Police Department, CITY OF GUNNISON POLICE DEPARTMENT, JAMES ROBERT KEEHNE, RUSSELL LOCKE, ROBERT G. RYAN, KEITH ROBINSON, and J. STEWART FERGUSON, Defendants. and KEITH ROBINSON, J. STEWART FERGUSON, Defendants-Appellants.	)	No. 90-1296

ORDER

(Filed December 13, 1991)

Before McKAY, Chief Judge, and EBEL, Circuit Judge, and SAFFELS*, District Judge.

This matter comes on for consideration of appellants' petition for rehearing in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER,
Clerk

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*Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.